

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

IN THE MATTER OF APPLICATION  
FOR BENEFICIAL WATER USE  
PERMIT NO. 6217-s41N  
BY HOFER BROTHERS

F I L M E D

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND ORDER

APR 27 1977

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on October 4, 1976, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order, except that the Proposed Order is hereby amended in Item 1, line 5, by inserting the words "for stock water" that had been previously omitted, and changing in Items 1 and 6 the figure "30" to "50" acre-feet.

FINAL ORDER

1. Subject to the conditions cited below, the Permittee's Provisional Permit No. 6217-s41N is hereby granted allowing for the appropriation of 5.34 cubic feet per second of water or equivalent to 2,400 gallons per minute, not to exceed 60 acre-feet per year of water for supplemental irrigation and 6 acre-feet per year for stock water from Snow Coulee, a tributary of Strawberry Creek, in Liberty County, Montana, to be impounded in a 50-acre-foot reservoir on Snow Coulee, at a point in the SW $\frac{1}{4}$  NW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 7, Township 35 North, Range 4 East, M.P.M., and used for stock watering from January 1 to December 31, inclusive, of each year, and for supplemental irrigation on 80 acres in Section 12, Township 35 North, Range 3 East, and 90 acres in Section 7, Township 35 North, Range 4 East, M.P.M., and containing a total of 170 acres, more or less, from April 1 to October 30, inclusive, of each year.

2. The Provisional Permit is granted subject to all prior water rights in the source of supply and sources to which it is tributary, including, but not limited to, those claimed by the Objectors in this matter.

3. The issuing of a Provisional Permit by the Department in no way reduces the Permittee's liability for damage caused by the Permittee's exercise of his Provisional Permit nor does the Department in issuing a Provisional Permit in any way acknowledge liability for damage caused by the Permittee's exercise of his Provisional Permit.

4. The proposed reservoir shall have installed in it an adequate drainage device at the lowest point in the structure to allow water which is needed to satisfy prior water rights to flow by the point of diversion.

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5. This Provisional Permit is granted subject to any final determination of prior existing water rights in the source of supply as provided by Montana law.

6. The Permittee's new 50-acre-foot-reservoir dam must be built to meet all local Soil Conservation Service designs and specifications for a reservoir of this type to insure proper construction and safety of the structure. Maintenance on the dam and facilities must be completed as needed.

Recommendation

The Department recommends that all parties in this matter properly install and maintain adequate measuring devices to fit their particular individual situation where practical and keep a log of records of water used for proof of their water rights.

Done this 11<sup>th</sup> day of January, 1977.

*Orvin Ferris*  
Administrator, Water Resources Division  
DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

NOTICE: Section 89-8-100, R.C.M. 1947, provides that a person who is aggrieved by a final decision of the Department is entitled to a hearing before the Board of Natural Resources and Conservation. A person desiring a hearing before the Board pursuant to this section must notify the Department in writing within ten (10) days of the final decision.

Address: Department of Natural Resources and Conservation  
Natural Resources Building  
32 South Ewing  
Helena, MT 59601

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BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

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IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT )      PROPOSAL FOR DECISION  
NO. 6217-s41N BY HOFER BROTHERS. )  
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Pursuant to the Montana Water Use Act and to the Montana Administrative Procedures Act, after due notice, a hearing on objections to the above-described application was held in the Liberty County Courthouse at Chester, Montana, on Friday, July 2, 1976, at 9:30 a.m., Daniel G. Diemert, Hearing Examiner, presiding.

Representing Hofer Brothers were Edward Hofer and his attorney, Hugh Brown of Chester. Mr. Brown called Mr. Wayne Otto, a registered civil engineer, as a witness. Mr. Otto is a consultant for the construction of dams and was employed by the Applicant for this proposed diversion.

Objections were received to the application by the Department from Sun Ag, Inc., of Galata, Montana, through its attorney, Rae V. Kalbfleisch, and from Mr. Harrold E. Henry, through his attorney, Don R. Lee.

Mr. T. J. Reynolds attended the hearing on behalf of the Department of Natural Resources and Conservation. As required by law, the Hearing Examiner hereby makes the

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following Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order to the Administrator, Water Resources Division, Department of Natural Resources and Conservation:

PROPOSED FINDINGS OF FACT

1. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required to appropriate water from Snow Coulee, a tributary of Strawberry Creek.

2. On August 18, 1975, the Department received an Application for Beneficial Water Use Permit No. 6217-s41N from Hofer Brothers, who sought to appropriate 5.34 cubic feet of water per second or 2,400 gallons of water per minute not to exceed 255 acre-feet of water per year for supplemental irrigation, and 6 acre-feet of water per year for stockwatering, constituting a total of 261 acre-feet of water per year from Snow Coulee, a tributary of Strawberry Creek, in Liberty County, Montana, to be impounded in a 30-acre-foot reservoir on Snow Coulee, at a point in the SW1/4 NW1/4 SW1/4 of Section 7, Township 35 North, Range 4 East, M.P.M., and used for stockwatering from January 1 to December 31, inclusive, of each year, and for supplemental water on 80 acres in Section 12, Township 35 North, Range 3 East, and 90 acres in Section 7, Township 35 North, Range 4 East, M.P.M., and containing a total of 170 acres, more or less, from April 1 to October 30, inclusive, of each year.

3. The Department received objections from Sun Ag, Inc., on April 12, 1976, and from Mr. Harrold Henry on April 16, 1976. Both objectors alleged that any withdrawal of water from the Trail Creek-Strawberry Creek drainage, of which Snow Coulee is tributary, would adversely affect their prior water rights.

4. It appears that there are at times surplus appropriable waters in the source of supply.

5. If there is an adequate drainage device installed in the proposed structure and the Provisional Permit, herein applied for, is conditioned to be subject to the rights of prior appropriators, the rights of prior appropriators will not be adversely affected.

6. It appears that the proposed means of diversion or construction are adequate.

7. The proposed use of water to irrigate cropland and/or hayland is a beneficial use.

8. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

9. The Applicant has not asked for an appropriation of 15 cubic feet per second. It is not necessary to prove by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected.

10. The success of the proposed project is not dependent upon receiving all of the 255 acre-feet of water per year for irrigation.

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PROPOSED CONCLUSIONS OF LAW

1. The Application for Beneficial Water Use Permit No. 6217-s41N by Hofer Brothers seeking to appropriate water from Snow Coulee for supplemental irrigation and for stock-watering and to be impounded in a 30 acre-foot reservoir on Snow Coulee should be granted pursuant to the provisions of Chapter 8, Title 89 of the Revised Codes of Montana.

2. Pursuant to 89-886(1), R.C.M. 1947, valid rights of prior appropriators must be protected in the issuance of a beneficial water use permit.

3. The rights of prior appropriators will be protected if the permit is conditioned so as to protect those rights.

4. The issuing of a Provisional Permit in no way reduces the Applicant's liability for damage caused by the appropriation, nor does the Department, in issuing a Provisional Permit, in any way acknowledge liability for damage caused by the Applicant's exercise of his Provisional Permit.

5. Nothing decided herein has bearing on the status of water rights claimed by the Applicant other than the one herein applied for, nor does anything decided herein have bearing on the status of claimed rights of any other party except in relation to those rights herein applied for, to the extent necessary to reach a conclusion herein.

6. Based upon the above Proposed Findings of Fact and Proposed Conclusions of Law, the Proposed Order is hereby made:

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PROPOSED ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit No. 6217-s41N is hereby granted allowing for the appropriation of 5.34 cubic feet of water per second or equivalent to 2,400 gallons of water per minute not to exceed 60 acre-feet of water per year for supplemental irrigation and 6 acre-feet per year from Snow Coulee, a tributary of Strawberry Creek, in Liberty County, Montana, to be impounded in a 30-acre-foot reservoir on Snow Coulee, at a point in the SW1/4 NW1/4 SW1/4 of Section 7, Township 35 North, Range 4 East, M.P.M., and used for stockwatering from January 1 to December 31, inclusive, of each year, and for supplemental irrigation water on 80 acres in Section 12, Township 35 North, Range 3 East, and 90 acres in Section 7, Township 35 North, Range 4 East, M.P.M., and containing a total of 170 acres, more or less, from April 1 to October 30, inclusive, of each year.

2. The Provisional Permit is granted subject to all prior water rights in the source of supply and sources to which it is tributary, including but not limited to those claimed by the Objectors in this matter.

3. The issuing of a Provisional Permit by the Department in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of its Provisional Permit nor does the Department in issuing a Provisional Permit in any way

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acknowledge liability for damage caused by the Applicant's exercise of its Provisional Permit.

4. The proposed reservoir shall have installed in it an adequate drainage device at the lowest point in the structure to allow water which is needed to satisfy prior water rights to flow by the point of diversion.

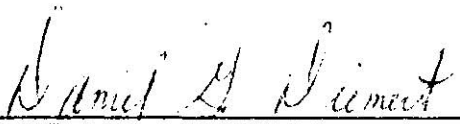
5. This Provisional Permit is granted subject to any final determination of prior existing water rights in the source of supply as provided for by Montana law.

6. The Applicants new 30-acre-foot reservoir dam must be built to meet all local Soil Conservation Service design and specifications for a reservoir dam of this type to insure proper construction and safety of the structure. Maintenance on the dam and facilities must be completed as needed.

NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to this Proposed Order, if any, shall be mailed to the Department within ten (10) days of service upon the parties herein. Upon receipt of any written exceptions, opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 4<sup>th</sup> day of October, 1976.

  
DANIEL G. DIEMERT

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